JD(ATL)—13—04
Wichita, KS

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

HAHNER, FOREMAN & HARNESS, INC.

and **CASES** **17-CA-22382**
17-RC-12206

UNITED BROTHERNOOD OF CARPENTERS & JOINERS OF AMERICA, CARPENTERS DISTRICT COUNCIL OF KANSAS CITY & VICINITY AND LOCAL 201

Stanley Williams, ***Esq***.,
for the General Counsel.
J. Michael Kennalley, Esq., and
W. Stanley Churchill, Esq.,
for the Respondent.
Angela M. Ford, Esq. and
Michael J. Stapp, Esq., for the
Charging Party.

DECISION

Statement of the Case

LAWRENCE W. CULLEN, Administrative Law Judge: This case was heard before me on February 3, 2004, in Wichita, Kansas. Following the filing of the Petition in Case 17-RC-12206 on May 29, 2003, and pursuant to a Stipulated Election Agreement approved by the Regional Director of the Seventeenth Region of the National Labor Relations Board ("the Board") on June 12, 2003, an election by secret ballot was conducted on July 9, 2003, among the employees in the agreed upon appropriate unit.[1]

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1 All journeymen and apprentice carpenters employed by the Employer within the Kansas Counties of Barber, Barton, Butler, Chautauqua, Cheyenne, Clark, Comanche, Cowley, Decatur, Edwards, Elk, Ellis, Ellsworth, Finney, Ford, Gove, Graham, Grant, Gary, Greeley, Greenwood, Hamilton, Harper, Harvey Haskell, Hodgeman, Kearner, Kingman, Kiowa, Lane, Logan, Marion, McPherson, Meade, Morton, Ness, Norton, Osborne, Pawnee, Phillips, Pratt, Rawlins, Reno, Rice, Rooks, Rush, Russell, Scott, Sedgewick, Seward, Sheridan, Sherman, Smith, Stafford, Stanton, Stevens, Sumner, Thomas, Trego, Wallace, and Wichita, but EXCLUDING all other employees, guards and supervisors as defined by the National Labor Relations Act.

The tally of ballots shows there were approximately ten eligible voters two (2) of who cast their ballots for the Petitioner, United Brotherhood of Carpenters & Joiners of America, Carpenters District Council of Kansas City & Vicinity and Local 201 ("the Union") and one (1) of who cast their ballot against the Petitioner. There were no void ballots and five (5) ballots were challenged.

On November 24, 2003, the Board issued a Decision and Direction in Case 17-RC-12206, directing that the challenge to the ballot of Fabian Morales be overruled, and ordering that the procedure be remanded to the Acting Regional Director for a hearing to resolve the issues raised by the challenges to the ballots of Daniel Caudell and Todd Stewart.

Upon a charge filed by the Union on September 10, 2003, in Case 17-CA-22382, on October 29, 2003, a Complaint and Notice of Hearing issued alleging that Respondent Hahner, Foreman & Harness, Inc. ("the Respondent" or "the employer") has engaged in various actions and conduct violative of Section 8(a)(1) of the National Labor Relations Act ("the Act"). The issues raised by the challenges to the ballots of Daniel Caudell and Todd Stewart were consolidated by the Acting Regional Director for hearing and decision with the issues in Case 17-CA-22382. The complaint alleges, Respondent admits and I find that at all times material herein, Respondent has been a corporation, with an office and place of business in Wichita, Kansas engaged in the building and construction industry, that during the 12-month period ending October 31, 2003, Respondent, in conducting its business operations, purchased and received at its facility, goods valued in excess of $50,000 directly from points outside the State of Kansas and Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The complaint also alleges and Respondent admits and I find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act. It is further alleged and admitted and I find that David A. Foreman is President and Bradley L. Oxford is General Superintendent and that at all material times they have each been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

The complaint also alleges that on April 10, 2003, Respondent's employees Daniel Caudell and Todd Stewart concertedly complained to Respondent regarding the wages, hours and working conditions of Respondent's employees, about changes to their health insurance, pension benefits and wages and on that date Respondent discharged its employees Daniel Caudell and Todd Stewart because they engaged in the aforesaid conduct and to discourage employees from engaging in these or other concerted activities.

At the hearing the parties stipulated to the following facts: Respondent is engaged in the construction industry as a general contractor for commercial and industrial buildings. The Union and the Respondent had been parties to successive 8(f) collective bargaining agreements for over 35 years. The last collective bargaining agreement between the Union and the Respondent was effective from April 1, 2002 through March 31, 2003, and has been entered in the record as Joint Exhibit 1. Under Article 10 of this

collective bargaining agreement Respondent paid pension and health and welfare benefits on behalf of unit employees into funds administered by the Kansas Building Trades also known as Kansas Construction Trade Funds. The amounts of these contributions are set forth in Article 12 of the collective bargaining agreement. Thursday, April 10, 2003, was the last day that Todd Stewart and Daniel Caudell worked for Respondent. The last project that Stewart and Caudell worked on was the Southwestern Bell project in Derby, Kansas. It was further stipulated that Robert Dick was both a foreman on this project and a member of the Carpenters Union as is permitted. At the hearing the General Counsel, with no objections, amended the complaint to correct the dates appearing in Paragraph 5A and 5B to April 10, 2003.

When the contract expired by its terms on March 31, 2003, the pension obligation and the health and welfare insurance (health insurance) coverage of the unit employees ceased. The employees learned of this curtailment of their benefits shortly thereafter. Employee Daniel Caudell learned of this when he tried to have a prescription for medicine filled and was told that his insurance was cancelled. He confirmed this by a telephone call to the Administrator of the Kansas Building Trades Funds. About a week prior to April 10, 2003, Caudell met with Respondent's President Dave Foreman to find out how his benefits would be affected by the expiration of the collective bargaining agreement. Caudell had worked regularly for Respondent for 20 to 25 years. He had been subject to periodic layoffs for lack of work when construction was slow but had worked exclusively for Respondent, as he would be called back to work as work became available. He was a valued employee and had on occasion served as superintendent on Respondent's projects. Foreman assured Caudell that he would not lose anything when the contract expired. Respondent's General Superintendent Bradley Oxford also assured employees including Caudell that they would not suffer any economic harm if the labor agreement expired and told them that the Respondent would pay the employees the money it had been paying to the benefit funds.

Following the expiration of the labor agreement most of the unit employees continued to work for Respondent with the Union's approval. It was not until early April that Caudell discovered he no longer had health insurance when he tried to have a prescription for medicine filled. Employee Todd Stewart also learned of the expiration of the labor agreement and his loss of health insurance, which was a matter of serious concern to him as he is a single father with partial custody of his son and he needed coverage to protect his son in the event of a need for medical care. On April 10, 2003, employees picked up their paychecks and Caudell found the fringe benefit contributions were not on his check and his check had not been increased by the amount of the benefit contributions as he had been assured by Foreman that it would be. Todd Stewart also found that his check no longer contained the fringe benefit contributions with no commensurate increase in his pay to compensate for the loss of the fringe benefits. Caudell asked job superintendent Bob Dick about this. Superintendent Dick told Caudell he did not know but would check with the office and left the Southwestern Bell jobsite where they were working to check with management. Later that morning General Superintendent Brad Oxford arrived at the jobsite and was initially approached by Todd Stewart who expressed his dissatisfaction with cancellation of his health insurance. The

conversation between Oxford and Stewart became heated and Caudell joined the conversation and then began to ask Oxford why his check had not been increased to make up for the cost of the benefits, which he had previously received. Oxford told Stewart and Caudell that this was the way it was going to be and if they did not like it, they could quit. Steward told Oxford he was not going to quit and that Oxford would have to lay him off if they wanted to get rid of him. Caudell told Oxford that there were three choices, he could quit, Respondent could lay him off or they could fire him and that he was not going to quit and if Respondent fired him, he would file a lawsuit. During the course of this conversation, Caudell told Oxford that if this was the way it was going to be, alluding to the loss of benefits and no commensurate increase in his paycheck, that he might not be able to work as fast as he normally did. Steward made a joking comment that he (Steward) was already going so slow that he did not see how he could slow down any. Oxford told them that a slowdown would be unacceptable. Oxford testified he then went to call Foreman on his cell phone and told him that Caudell and Stewart were threatening to slow down as a result of the loss of benefits. Foreman told Oxford to fire them. Oxford also told Foreman that Caudell had threatened to sue if he were fired. Foreman then told Oxford to lay them off and Oxford did so immediately and sarcastically said "Bye Bye" to them as they left the jobsite. Neither employee has since been recalled to work. There was a good deal of work available to be performed at the time as the work on the Southwestern Bell project had just begun.

Analysis

I find that employees Caudell and Stewart were engaged in protected concerted activities when Caudell joined Steward and commenced to voice his complaints about the loss of benefits and no commensurate increase in pay for the loss of benefits. Although I note that Stewart was more upset with the loss of his health insurance which covered his son, and Caudell appeared more upset about the lack of a commensurate increase in pay to enable him to purchase health insurance, they essentially joined together to protest the loss of benefits with the object of recovering the benefits or at least the amount of the contributions by Respondent to enable them to obtain benefits to replace the coverage they were losing. Thus they were engaged in protected concerted activities for their mutual aid and protection. I find they were engaged in protected concerted activities under Section 7 of the Act. I find that the General Counsel has established a prima facie case of a violation of the Act by Respondent when it laid off its employees Stewart and Caudell with no intention of recalling them after they complained to Respondent with a goal of recovering their benefits. I find that Respondent has failed to rebut the prima facie case by the preponderance of the evidence. I find the discussion of a slow down by Caudell and the limited joking comments by Stewart concerning his inability to slow down were not so egregious as to lose the protection of the Act.

The Board in ***Meyers Industries (Meyers I)***, 268 NLRB 493 (1984), remanded sub. Nom. ***Prill v. NLRB***, 755 F.2d 941 (D.C. Cir. 1985) noted that the concept of concerted action has its basis in Section 7 of the Act. Section 7 of the Act in pertinent part states:

> Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection.

The Board pointed out in ***Meyers I*** that although the legislative history of Section 7 of the Act does not specifically define concerted activity, it does reveal that Congress considered the concept in terms of individuals united in pursuit of a common goal. The Statute requires that the activities under consideration be "concerted" before they can be "protected." As the Board observed in ***Meyers I***, "Indeed, Section 7 does not use the term 'protected concerted activities' but only concerted activity." It goes without saying that the Act does not protect all concerted activity. With the above, as well as other considerations in mind, the Board in ***Meyers I*** set forth the following definition of concerted activity:

> In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.

In ***Meyers Industries (Meyers II)***, 281 NLRB 882 (1986), enfd. Sub. Nom. ***Prill v. NLRB***, 835 F.2d 1481 (D.C. Cir. 1987), the Board made it clear that under the proper circumstance a single employee could engage in concerted activity within the meaning of Section 7 of the Act. The question of whether an employee has engaged in concerted activity is a factual one based on the totality of record evidence. See e.g. ***Ewing v. NLRB***, 861 F.2d 353 (2nd Cir. 1988). The Board has found an individual employee's activities to be concerted when they grew out of prior group activity. ***Every Women's Place***, 282 NLRB 413 (1986). An employee's activity will be concerted when he or she acts formally or informally on behalf of the group. ***Oakes Machine Corp.***, 288 NLRB 456 (1988). Concerted activity has been found where an individual solicits other employees to engage in concerted or group action even where such solicitations are rejected. ***El Gran Combo de Puerto Rico***, 284 NLRB 1115 (1987), enfd. 853 F.2d 966 (1st Cir. 1988). The Board has long held, however, that for conversations between employees to be found protected concerted activity, they must look toward group activity and that mere "griping" is not protected. See ***Mushroom Transportation Co. v. NLRB***, 330 F.2d 683 (3rd Cir. 1964).

In ***Wright Line***, 251 NLRB 1083, enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in ***NLRB v. Transportation Management Corp.***, 462 U.S. 393 (1983), the Board set forth its causation test for cases alleging violations of the

Act that turn, as does the case herein, on employer motivation. First the General Counsel must persuade the Board that antiunion sentiment was a substantial or motivating factor in the challenged employer conduct or decision. Once this is established the burden then shifts to the employer to prove its affirmative defense that it would have taken the same action even if its employee had not engaged in protected concerted activity. See ***Manno Electric, Inc.***, 321 NLRB 278, fn. 12 (1996).

Counsel for the General Counsel must demonstrate by preponderant evidence (1) that the employee was engaged in protected concerted activity; (2) that the employer was aware of the activity; (3) that the activity or the workers' union affiliation was a substantial or motivating reason for the employer's action; and (4) there was a causal connection between the employer's animus and its discharge decision.

Counsel for General Counsel may meet the ***Wright Line*** burden with evidence short of direct evidence of motivation, i.e., inferential evidence arising from a variety of circumstances such as union animus, timing or pretext may sustain the General Counsel's burden. Furthermore, it may be found that where an employer's proffered non-discriminatory motivational explanation is false, even in the absence of direct evidence of motivation, the trier of fact may infer unlawful motivation. ***Shattuck Denn Mining Corp.(Iron King Branch) v. NLRB***, 362 F.2d 466, 470 (9th Cir. 1966); ***Fluor Daniel, Inc.***, 304 NLRB 970 (1991). Motivation of union animus may be inferred from the record as a whole, where an employer's proffered explanation is implausible or a combination of factors circumstantially support such inference. ***Union Tribune Pub. Co. v. NLRB***, 1 F.3d 486, 490-492 (7th Cir. 1993). Direct evidence of union animus is not required to support such inference. ***NLRB v. S0-White Freight Lines, Inc.***, 969 F.2d 401 (7th Cir. 1992).

It is clear as discussed above that Caudell and Stewart were engaged in protected concerted activity when they voiced their protests to Oxford concerning the loss of their health insurance and the loss of their retirement and pension benefits and the lack of an increase in Caudell's paycheck in the amount the Respondent had been expending on the health insurance and pension benefits. As the General Counsel notes in his brief, these two employees were understandably upset by the loss of the benefits and had discussed the situation with themselves and with other employees. Under these circumstances the statement by Caudell, an employee of more than 20 years, that if he was to be paid $5 less an hour he might not be able to work as hard as he had been was part of his protest and was not so egregious as to lose the protection of the Act. Stewart testified that he (Stewart) stated he did not believe he could work any slower in a joking reference to his normal rate of speed which was reputed to be slow. However there was no threat made by Stewart that he would slow down. Only after prolonged testimony on cross-examination did Oxford testify that Stewart had threatened to slow down. However this testimony is in conflict with the testimony of Foreman as well as that of Stewart as Foreman testified that Oxford reported to him that Stewart and Caudell were protesting their loss of health insurance and benefits and that Caudell had threatened to file a lawsuit if he were fired and had threatened to slow down. Foreman's testimony clearly did not support that of Oxford concerning Stewart's alleged threat of a slowdown and yet

Foreman testified he had initially decided to fire Stewart and Caudell but decided to lay them off instead. Foreman did not testify that he had received any information whatsoever from Oxford that Stewart had threatened to slow down and yet Foreman made the decision to lay off Stewart as well as Caudell. This clearly demonstrates that Caudell and Stewart were laid off because of their protest of the loss of their health and pension benefits and at least in Caudell's case the lack of a corresponding increase in his paycheck to ensure that he not sustain any loss in pay as a result of the loss of health insurance and pension benefits as both Foreman and Oxford had assured him.

Applying the above-discussed relevant case law to the facts of this case, I find General Counsel has established prima facie cases of violations of Section 8(a)(1) by the layoffs of Stewart and Caudell with no prospects of recall by Respondent. Essentially Respondent discharged Stewart and Caudell as it had no intention of recalling them. Respondent admittedly termed the action as a layoff rather than a discharge as it perceived that this might fend off the possibility of a lawsuit which Caudell had threatened to file if he were discharged. The evidence is uncontroverted that Respondent discharged Caudell and Stewart because of their engagement in protected concerted activities when they complained about the loss of benefits. I find that the reference to a slowdown by Caudell and the limited comment by Steward concerning his inability to slow down were not so egregious as to lose the protection of the Act. I find that the Respondent had knowledge of Caudell's and Stewart's engagement in protected concerted activities, and that their discharge was motivated by Respondent's disdain for their engagement in the protected concerted activities. I further find that the Respondent has failed to rebut the prima facie cases by the preponderance of the evidence as it has not shown that it would have discharged them in the absence of their engagement in protected concerted activities. I find that the discussion of a possible slowdown by Caudell and Stewart was not so egregious as to cause them the loss of the protection of the Act. I also find that there was ample work available at the time of their discharge. ***Wright Line****, supra.*

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by discharging Daniel Caudell and Todd Stewart.

4. The above unfair labor practices in conjunction with Respondent's status as an employer affect commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The Remedy

Having found that Respondent has violated Section 8(a)(1) of the Act, it shall be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Respondent having discriminately discharged Daniel Caudell and Todd Stewart, shall be ordered to offer them reinstatement to their former positions, or if those positions no longer exist, to substantially equivalent positions and make them whole for any loss of earnings and benefits they sustained as a result of the unlawful discrimination against them less any net interim earnings, as prescribed in ***F. W. Woolworth Co.***, 90 NLRB 289 (1950), plus interest as computed in ***New Horizons for the Retarded***, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[2]

ORDER

Respondent Hahner, Foreman & Harness, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Unlawfully discharging employees because of their engagement in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative actions:

(a) Rescind the discharges of employees Daniel Caudell and Todd Stewart.

(b) Within 14 days from the date of this Order, offer Daniel Caudell and Todd Stewart full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions without prejudice to seniority or any other rights or privileges previously enjoyed. Make Daniel Caudell and Todd Stewart whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in The Remedy section of this decision.

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2 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and within 3 days thereafter notify the employees in writing that this has been done and that the warnings and discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Wichita, Kansas copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employers employed by the Respondent at any time since March 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

As I have found that employees Daniel Caudell and Todd Stewart were unlawfully discharged and have ordered their reinstatement I find the challenges to their ballots should be and they hereby are Dismissed. I order also that Case 17-RC-12206 be severed from Case 17-CA-22382 and remanded to the Regional Director of Region 17 for a tally of the Ballots and the certification of the results of the election.

Dated at Washington, D.C.

Lawrence W. Cullen
Administrative Law Judge

3 If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading **"POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD"** shall read **"POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."**

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against employees who engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with you in the exercise of your rights under the National Labor Relations Act.

WE WILL rescind the unlawful discharges of Daniel Caudell and Todd Stewart.

WE WILL offer Daniel Caudell and Todd Stewart reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent jobs with all the rights and privileges previously enjoyed by them.

WE WILL make them whole in the manner set forth in The Remedy provisions of this Decision from the dates of their discharges until the date of a valid offer of employment or reinstatement.

WE WILL expunge from our files any reference to the unlawful warnings and discharges and notify them in writing that this has been done and that these personnel actions will not be used against them in any manner.

HAHNER, FOREMAN & HARNESS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

8600 Farley St., Ste. 100, Overland Park, KS 66212-4677.
(913) 967-3000, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978-2925.